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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 40) dismissing appellant's suit to set aside an order (J.S. 41–46) of the Interstate Commerce Commission. The order granted the application of the Railway Express Agency, Inc. ("REA"), under Sections 20a and 214 of the Interstate Commerce Act (49 U.S.C. 20a, 314) to issue 500,000 shares (or 20%) of its common stock to the Greyhound Corporation ("Greyhound").

REA is a common carrier by express on railroads and a common carrier by motor vehicle. Greyhound operates a nationwide passenger bus system and, like other bus companies, also carries some express shipments.

REA is entirely owned and controlled by sixty major railroads (including the five railroad appellants herein). Until 1964 it was governed by a 23-member board of directors, of which 18 were elected by the railroad stockholders grouped into three regional districts.[1] The remaining 5 were elected at large. The right to nominate a specific number of directors can only be changed by a vote of two-thirds of the outstanding stock. From 1929 to 1961 REA was operated on a non-profit basis, and its profits or losses were shared by the railroad stockholders. In 1961 it changed to a profit-and-loss basis and began to acquire facilities and equipment, which had previously been leased or obtained from other carriers. In 1963 REA removed from its charter the provision limiting stock ownership to railroad corporations but preserved to its railroad stockholders a right of first refusal on the sale of all outstanding stock (J.S. 42). The composition of the board of directors was left unchanged.

REA has experienced great difficulties in financing its new program of capital improvements. Those difficulties are principally attributable to REA's short

[1] The stockholdings and right to board representation of the three districts are as follows: Eastern District, 1,085,748 shares and 7 directors; Western District, 633,180 shares and 6 directors; and Southern District, 280,260 shares and 5 directors.

history of profitable operations and its unfavorable ratio of debt to equity (J.S. 33, 43). In 1964, Greyhound submitted to REA an offer to acquire control of REA through purchase of 67 percent of REA's stock, subject to Commission approval. As part of that offer, Greyhound proposed to finance its pro rata share of REA's capital requirements. Greyhound's offer, however, was contingent upon the waiver by all present stockholders of their right of first refusal, and was not accepted (J.S. 33–34).

Thereafter, REA and Greyhound executives began exploring potential savings and advantages which might be achieved by correlating or combining certain activities of the two corporations, including joint use of terminals, garages, communication facilities, and sales solicitation forces. As an incentive to pursue these possibilities, Greyhound desired at least a 20 percent equity interest in REA (J.S. 8, 9, 34).

From these discussions emerged an agreement, approved by REA's board of directors and by its stockholders,[2] which contemplated giving Greyhound a voice in REA affairs and an interest in its stock. The agreement provided that (1) Greyhound would acquire a 20 percent stock interest in REA through purchase of 500,000 shares of authorized but unissued stock (which is not subject to the railroad stockholders' right of first refusal); (2) REA's board of directors would be increased from 23 to 25 and Greyhound would name five members; (3) upon consummation of the initial stock sale, Greyhound would offer, for a

[2] The stockholder vote was 1,654,572 shares for the agreement, and 269,880 shares against it (J.S. 43).

period of 60 days, to purchase at $20 per share an additional one million shares of the outstanding REA common stock; (4) REA's board would declare by resolution "the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage"; and (5) REA would seriously consider the sale of its stock to airlines and to the public (J.S. 34).

Pursuant to that agreement, on October 7, 1964, REA applied to the Commission for authorization under 49 U.S.C. 20a to issue 500,000 shares to Greyhound (J.S. 41). Detailed factual data concerning the proposed transaction were set out in the application and in two additional responses required by the Commission. Various petitions and complaints were filed by appellants herein, all generally alleging that the application constituted an attempt by Greyhound to obtain control of REA, and requesting a hearing under Section 5 of the Interstate Commerce Act. In addition, the Department of Justice filed a petition urging the Commission to exercise its powers under Section 11 of the Clayton Act by conducting an investigation into the possible anti-competitive effects under Section 7 of the Clayton Act. None of the intervenors challenged the accuracy of the facts supplied by REA.

In response to the intervenors' petitions, REA urged that the evidence conclusively established that

the proposed stock issuance meets the standards of Section 20a, and that the questions of control and effect upon competition are premature and should be postponed until the results of Greyhound's 60-day offer are known. In addition, Greyhound filed a statement in which it denied that the stock acquisition, in these circumstances, raised any issue of control, and asserted that: "In the event that Greyhound should subsequently acquire any additional stock interest which would even approach a position of control, Greyhound would file an appropriate application under Section 5 of the Interstate Commerce Act" (see J.S. 44).

With respect to the intervenors' petitions, the Commission found that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time; and that a hearing is not necessary for a determination of the application for authority to issue [the] stock under the provisions of sections 20a and 214" (J.S. 42).

With respect to REA's application, the Commission found that REA urgently needs the $10,000,000 to be realized through the stock issue, that it is handicapped in borrowing capital funds because of its unfavorable debt-equity ratio, that the stock issue would improve the ratio while reducing the need for future borrowing, and that the sale price is fair and reasonable (J.S. 43–44). Cautioning that nothing in its order "shall be construed as a determination of any matter

under any section of the act, except sections 20a and 214" (J.S. 44), the Commission concluded that the stock issue

> * * * (a) is for a lawful object within [REA's] corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company and a common carrier by motor vehicle, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose * * *. [J.S. 45.]

Petitions for reconsideration were filed by all appellants herein. The Department of Justice, which alone had raised the question of a possible lessening of competition under Section 7 of the Clayton Act, did not petition for reconsideration, and the Clayton Act issue was not urged in any of the petitions filed by the other parties. Reconsideration was denied by the Commission.

On appeal, the three-judge district court sustained the Commission's order, noting that "until the facts are developed by occurrences after the stock issuance, hearings on control and competitive effects are no more than an exercise in futility" (J.S. 39). The court specifically stated: "The Commission did not decide, and we do not decide, any questions relating to control competition They are for the future" (*ibid*).

ARGUMENT

Under Section 20a of the Interstate Commerce Act, the Commission is given substantial regulatory powers

over the financial structure of carriers subject to the Commission's jurisdiction. In particular, Section 20a makes the issuance of "any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier" (other than short-term notes) and the assumption of any obligation or liability by the carrier subject to the prior approval of the Commission. It seems evident that the dominant purpose of these provisions is the maintenance of "a sound structure for support of railroad credit to aid in developing a national transportation system" and, indirectly, the protection of "the investing public against faulty or dishonest financing which could result in dissipation of railroad resources" (*Chicago South Shore and S. Bend R.R.* v. *United States,* 221 F. Supp. 106, 108 (N.D. Ind.)). Section 20a is thus to be read against the dramatic history of the improvident and fraudulent transactions in railroad securities which marked the latter half of the nineteenth century.[3]

It was in terms of these financial considerations that the Commission scrutinized REA's application to issue 500,000 shares of its common stock. Finding that REA urgently needed the equity capital to be realized by the sale and that the sale price was fair and reasonable, the Commission authorized the issue. Appellants do not suggest that in this financial aspect the Commission's order was unsupported by the record or otherwise improper. What appellants do

[3] See Beard & Beard, *The Rise of American Civilization* (1930 ed.) II, 198-204; Morison & Commager, *The Growth of the American Republic* (1950 ed.) II, 114; Sharfman, *The Interstate Commerce Commission* (1931) I, 190.

urge is (1) that the Commission erred in failing to determine, as a precondition for its action under Section 20a, whether the proposed transaction would violate Section 5(4) of the Act by giving Greyhound control of REA, and (2) that the Commission erred in failing to evaluate the probable competitive impact of the proposed transaction as an element of the "public interest" standard of Section 20a.

1. The Commission's decision not to conduct an immediate Section 5 investigation clearly presents no substantial question. The sole issue here is one of timing. There is no basis for charging the Commission with an abuse of discretion because it chose to defer an investigation under Section 5 of the Act until "the chain of events started by the stock issuance is ascertainable rather than conjectural" (J.S. 39). Upon completion of the stock issuance, Greyhound has undertaken to offer, for sixty days, to buy up to 1,000,000 shares of REA at $20 per share from the present railroad shareholders. The outcome of that offer is uncertain. It is possible, although apparently unlikely, that no stock will be tendered at the offer price. If some stock is tendered by some railroads, others—including appellant railroads—may exercise their right of first refusal and wind up with substantially enhanced control of REA. Or, Greyhound may acquire some or all of the shares it offers to buy. Clearly, the degree to which any of these possibilities are realized will materially affect the extent and nature of Greyhound's control of REA, if any, and the competitive significance of such control. In these circumstances it seems entirely reasonable

that, rather than proceeding on a piecemeal basis, the Commission should postpone an investigation under Section 5 until the situation crystallizes.

The Commission's order constitutes a determination of none of the substantive issues pressed by appellants and it forecloses no avenue of relief. The Commission found that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time" (J.S. 42). The order further states that "if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition" (J.S. 44). Finally, and unequivocally, the order provides that "nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any such application under section 5" (J.S. 44–45). In sum, there can be no doubt that, whatever the outcome of Greyhound's 60-day offer, appellants are free to seek a full investigation under Section 5 when all the relevant facts are ascertainable and that none of the issues which may thus be raised has been determined.[4]

[4] Appellants also urge (J.S. 12–13) that the Commission erred in failing to conduct an investigation under Section 11 of the Clayton Act (15 U.S.C. 21) to determine whether the pro-

2. Appellants further urge that, regardless of the propriety of the Commission's decision to defer an investigation under Section 5, Section 20a requires the Commission to assess the probable competitive impact of the proposed transaction as an element of the "public interest." Such a reading of the statutory language seems at odds with the pattern of the Act and unwarranted by considerations of policy. As noted above (pp. 6–7, *supra*) Section 20a is concerned with preventing the improvident or fraudulent issuance of securities and thus with protecting the financial structure and credit of interstate carriers. Unlike Section 5, which is designed to regulate the merger of carriers and the acquisition of control by one over another, Section 20a confers no power on the Commission to immunize transactions under the antitrust laws (compare *Seaboard Air Line R. Co.* v. *United*

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posed transaction might violate Section 7 of that Act (15 U.S.C. 18). As noted above (p. 6, *supra*), this issue was raised before the Commission by the Department of Justice, whereas appellants confined their allegations of anticompetitive effects to the context of Section 5 of the Commerce Act. Although appellants now suggest (J.S. 15) that *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *Pabst Brewing Co.*, 384 U.S. 546; and *United States* v. *Von's Grocery Co.*, 384 U.S. 270, supply the appropriate standards for a Section 11 investigation, they do not indicate how such standards are to be associated with those appropriate to the potential proceedings under Section 5 (cf. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154). In all events, the Commission decided only that an investigation under Section 7 of the Clayton Act "would not be appropriate at this time" (J.S. 42)—for the same reasons that made an investigation under Section 5 of the Commerce Act appear premature. As the district court concluded (J.S. 39), until the facts become ascertainable, to pursue either line of inquiry would be "no more than an exercise in futility."

States, 382 U.S. 154).[5] Moreover, because Section 20a is addressed exclusively to the *issuance* of securities, it is a wholly inadequate instrument for the purposes appellants would assign to it. Whenever a carrier may acquire the securities of another indirectly, through market transactions or otherwise, Section 20a, unlike Section 5, is useless.

Attempting to read the Act as a rational system of regulation leads to the conclusion that questions of inter-carrier control and related anticompetitive consequences are appropriately considered in proceedings under Section 5 and need not be forced into the text of Section 20a.[6] While it may well be that in some circumstances the Commission will find it desirable and appropriate to examine these questions in advance of approving an issuance of securities, nothing in the statutory scheme requires such inquiry. Insofar as appellants are apprehensive that they will fall between two stools because the anticipated anticompetitive effects may ensue from a relationship between Greyhound and REA that is too limited to constitute "control" under Section 5, it would seem that they have taken an unduly narrow view of that term. This Court has recognized that "control" as used in Section 5 was intended by Congress to have a broad scope and that the Commission has commensurately broad power "to protect its jurisdiction under § 5(2)"

[5] It is unnecessary to consider here the somewhat ambiguous dictum of the district court (J.S. 39) concerning the relevance of *Seaboard* to Section 20a. We do not understand the court to indicate that the Commission may confer antitrust immunity under Section 20a.

[6] See *Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. 415.

(*Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 125).[7] It therefore seems likely that a measure of inter-carrier influence sufficient to involve an undue restraint on competition would also involve sufficient control to invoke Section 5. Indeed, were the Act read otherwise, Section 5 would be powerless to reach a wide variety of security transactions—such as open market purchases—that clearly cannot be reached under Section 20a.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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[7] See *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 163–165; *Chesapeake & Ohio Ry. Co. Purchase*, 271 I.C.C. 5, 15–17, 38–39, 43.

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